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# LEGAL LACUNA IN WARTIME TERRORISM

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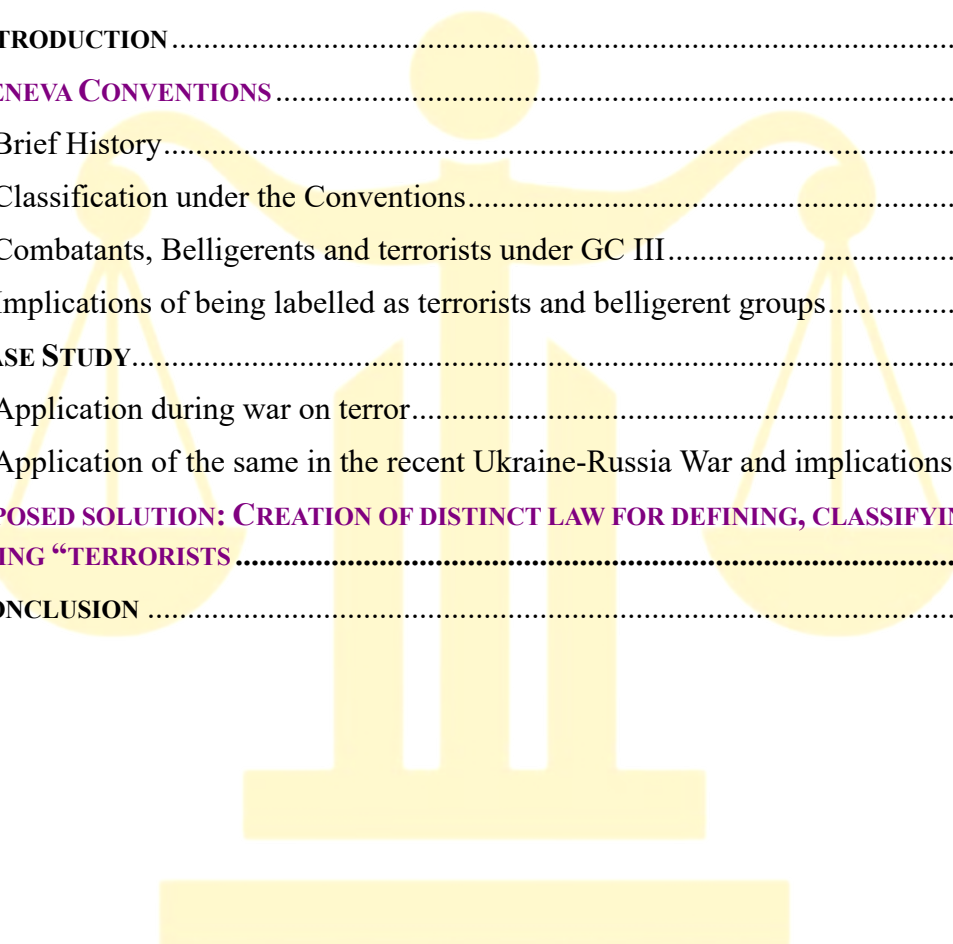
## ABSTRACT

*This paper critically examines a significant loophole in international law concerning the classification of international terrorists, with a specific focus on the legal consequences of designating combatants as "unlawful belligerents." While the term "terrorism" lacks a universally agreed-upon definition, it is broadly understood as a method of coercion that employs or threatens violence to spread fear, thereby pursuing political or ideological goals, as defined by the UN Office of Drugs and Crime. The challenges associated with countering terrorism, both during peacetime and wartime, have a long history. Despite the United Nations' efforts to address international terrorism through specialized committees and Security Council resolutions, a persistent legal gap exists regarding the treatment of individuals engaged in terrorism during armed conflicts. The heart of this issue lies in the fact that existing international laws and conventions predominantly apply during peacetime, leaving a void when it comes to wartime scenarios. This gap has resulted in inconsistent categorization of individuals involved in acts of terrorism during armed conflicts. Specifically, the foundational principles of International Humanitarian Law (IHL) ensure that no one is left unprotected in times of war. However, the current categories protected under IHL—wounded, sick, and shipwrecked, prisoners of war, civilians, and combatants hors de combat—do not adequately encompass individuals engaged in terrorism whose actions intentionally harm civilians and fall outside the scope of legitimate duties or innocence. The paper highlights two compelling case studies to illustrate these legal ambiguities. In the Russia-Ukraine conflict, both parties have labelled each other as "terrorists," blurring the lines between combatants and terrorists and raising questions about the proper application of IHL. Furthermore, the Guantanamo Bay detainee case serves as a poignant example of the consequences of classifying individuals as "unlawful belligerents" in the context of the "War on Terror." On the one hand, Russia asserts that individuals designated as terrorists*

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*in the context of the Ukraine-Russia conflict are not entitled to protection. On the other hand, they are subjected to acts of torture while detained at Guantanamo Bay due to their classification as terrorist entities. Drawing from these recent examples, this paper underscores the pressing need for a distinct categorization of individuals perpetrating acts of terrorism during wartime. Such a categorization would prevent these individuals from being afforded the same protections as those covered by the Geneva Conventions and reduce the risk of mislabelling legally protected individuals as "terrorists."*



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## I. INTRODUCTION

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In an ever-changing world where conflicts and crises persist, the relevance of international law as a guardian of global peace and human rights cannot be overstated. Central to this body of law are the Geneva Conventions, a set of treaties that emerged in the aftermath of the devastating World War II. These conventions stand as a testament to the international community's commitment to minimizing suffering during times of war, affording protection to the wounded, sick, shipwrecked soldiers, prisoners of war, civilians, and combatants hors de combat. They reflect a collective determination to uphold the principles of humanity and ensure that no one is left unprotected in the face of the ravages of war.

However, as the nature of conflict has evolved, a critical gap has emerged within the framework of international law. This gap revolves around the classification of international terrorists and the legal consequences of designating them as "unlawful belligerents." The term "terrorism" itself remains an enigma, marked by subjectivity and diversity of interpretation. It is often defined as the use or threat of violence to spread fear for political or ideological gain, as recognized by the United Nations Office of Drugs and Crime.

Tackling the complex challenges posed by terrorism, whether during times of peace or within the tumult of armed conflicts, has become a paramount concern for the global community. Despite persistent efforts by the United Nations, including the work of specialized committees and Security Council resolutions, a conspicuous void remains within international law concerning the treatment of individuals involved in terrorism during warfare. This paper embarks on a critical examination of this deficiency, focusing on the classification of these individuals as "unlawful belligerents."

The essence of this issue is rooted in the fact that current international legal frameworks, designed primarily for peacetime conditions, are ill-suited to address the complexities of terrorist activities during wartime. While these frameworks diligently safeguard various categories, such as the wounded, sick, shipwrecked soldiers, prisoners of war, civilians, and combatants hors de combat, they do not adequately encompass individuals engaged in acts of terrorism. These individuals intentionally target civilians, commit acts of violence, and often operate beyond the bounds of legitimate military duties or innocence.

This research paper aims to delve into the intricate web of dilemmas surrounding the treatment and classification of individuals engaged in terrorism during armed conflicts. To illustrate these legal ambiguities, two compelling case studies will be explored in detail.

The first case study will focus on the ongoing Russia-Ukraine conflict, a context where both parties have resorted to labelling each other as "terrorists." This practice blurs the distinctions between combatants and terrorists, challenging the proper application of International Humanitarian Law (IHL) and raising questions regarding the protection and rights of individuals embroiled in such conflicts.

The second case study will revolve around the Guantanamo Bay detainees, emblematic of the repercussions of classifying individuals as "unlawful belligerents" within the context of the "War on Terror." The United States government's detention and treatment of these individuals highlight the ethical and legal dilemmas associated with designating certain individuals as terrorist entities.

These real-world examples will serve as vivid demonstrations of the shortcomings of existing international laws in addressing the legal status and protection of individuals involved in terrorism during armed conflicts. They underline the perils of misclassification and underscore the urgent necessity for a distinct legal categorization that ensures these individuals neither inadvertently receive the same protections as those guaranteed by the Geneva Conventions nor endure inhumane treatment due to their classification as terrorists.

This research endeavour does not merely aim to expose the deficiencies in international law; it also seeks to propose a solution. By advocating for the creation of a distinct legal framework for defining, classifying, and protecting individuals involved in acts of terrorism during wartime, this paper strives to contribute to the enhancement of international law, the protection of human rights, and the pursuit of global peace and security.

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## I. GENEVA CONVENTIONS

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### A. Brief History

A Swiss businessman, Henry Durant visited the soldiers wounded in the Battle of Solferino in 1859. He witnessed the acute lack of medical aid, personnel, and facilities available to help these soldiers. He published a book- A Memory of Solferino- in 1862 on the horrors of war.

His experience led him to propose a permanent relief agency for humanitarian aid in times of war and a government treaty recognising the neutrality of the agency and allowing it to provide aid in a war zone. The former was the stepping stone for establishing the Red Cross in Geneva.<sup>2</sup> As a result of the latter, the 1864 Geneva Convention came into being. This was the first codified international treaty that covered the sick and wounded soldiers on the battlefield. Representatives of 12 governments signed the Geneva Convention on 22 August 1864 “for the Amelioration of the Condition of the Wounded in Armies in the Field.”<sup>3</sup>

Henry Durant was awarded the prestigious Nobel Peace Prize in 1901 for both these establishments. The first attempt to expand the 1864 treaty was made on October 20, 1868, but it failed. With the "Additional Articles relating to the Condition of the Wounded in War," an effort was made to expand specific treaty provisions to maritime conflict and to explain others. Only the Netherlands and the United States of America ratified the Articles, notwithstanding their signing. Later, the Netherlands decided not to ratify. The third Hague Convention of 1899 and the tenth Hague Convention of 1907 would subsequently make the protection of victims of maritime warfare a reality. 35 nations gathered for a conference that the Swiss government organised in 1906. It led to the passage of the "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field" on July 6, 1906, which, for the first time, amended and complemented the 1864 agreement. It was still in effect after Costa Rica ratified the 1949 Geneva Conventions in 1970. Two conventions produced during the 1929 conference were ratified on July 27.<sup>4</sup>

The "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field" was the first iteration to replace the original 1864 convention. The other was approved after World War I experiences revealed flaws in the 1899 and 1907 Hague Convention's treatment of prisoners of war. These earlier treaties negotiated at The Hague were not to be replaced; instead, the "Convention relative to the Treatment of Prisoners of War" was to be added to them.<sup>5</sup>

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<sup>2</sup> Rosalid Nyawira Macharia, "The Application of the Best Interests of the Child Principle to Protect the Interests of Children in Armed Conflict Situations," 2015, [URL] (last visited October 13, 2023)..

<sup>3</sup> Dunant, Henry (December 2015). A Memory of Solferino. English version, full text online..

<sup>4</sup> "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864." Geneva, Switzerland: International Committee of the Red Cross ICRC. Retrieved 11 June 2017.

<sup>5</sup> Roxburgh, Ronald (1920). International Law: A Treatise. London: Longmans, Green and co. p. 707. Retrieved 14 July 2009..

## B. Classification under the Conventions

International humanitarian law, the body of international law that governs the conduct of armed conflict and strives to mitigate its effects, is centred on the Geneva Conventions and their Additional Protocols. They specifically defend those not engaged in combat (civilians, medical professionals, and humanitarian workers) and those who have left the fray (wounded, ill, shipwrecked soldiers, and prisoners of war). The Conventions and their Protocols demand that actions be taken to stop or prevent all violations. They have strict guidelines for handling what are referred to as "grave breaches." Whatever their country, those guilty of serious violations must be found, brought to justice, or extradited.<sup>6</sup>

The first Geneva Convention protects wounded and sick soldiers on land during war. Following the adoption of versions in 1864, 1906, and 1929, this Convention constitutes the fourth revision of the Geneva Convention on the Wounded and Sick. There are 64 articles in it. These shield the injured and ill, as well as medical, religious, and other staff members, as well as medical units and transports. The distinguishing insignia are acknowledged by the Convention as well. It comprises two annexes: a model identity card for medical and religious professionals and a draft agreement about hospital zones.<sup>7</sup>

The second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war. This Convention replaced the Hague Convention of 1907 for the Adaptation of the Geneva Convention's Principles to Maritime Warfare. In terms of both structure and content, it closely resembles the first Geneva Convention. There are 63 articles that are especially relevant to naval warfare. For instance, it safeguards medical ships. One of its appendices includes a sample identity card for those in the medical and religious fields.<sup>8</sup>

The third Geneva Convention applies to prisoners of war. The 1929 Prisoners of War Convention was succeeded by this one. It has 143 articles, compared to the 1929 Convention's 97. According to Conventions I and II, a wider range of people qualify for the status of prisoner of war. Particularly with regard to the labour performed by prisoners of war, their financial

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<sup>6</sup> Fleck, Dietrich (2013). *The Handbook of International Humanitarian Law*. Oxford: Oxford University Press. p. 322. ISBN 978-0-19-872928-0.

<sup>7</sup> International Committee of the Red Cross, "Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949," IHL Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949> (last visited October 13, 2023).

<sup>8</sup> International Committee of the Red Cross, "Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949," IHL Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949> (last visited October 13, 2023)..

resources, the relief they receive, and the legal actions taken against them, the conditions and locations of captivity were more clearly specified. Following the end of active hostilities, the Convention establishes the principle that prisoners of war must be immediately liberated and returned home. There are five annexes to the Convention, each with various model rules, identification, and other cards.<sup>9</sup>

The fourth Geneva Convention affords protection to civilians, including those in occupied territory. Prior to 1949, the Geneva Conventions only applied to combatants; they did not apply to civilians. The events of World War II demonstrated the terrible repercussions of not having a convention for the protection of civilians in times of conflict. The 1949 Convention takes into account the outcomes of World War II. There are 159 articles in it. It has a brief section on general population protection from the effects of war but skips over the hostilities themselves, which were eventually covered in the Additional Protocols of 1977. The majority of the Convention is concerned with the status and treatment of people who are considered protected, distinguishing between the situation of foreigners on the territory of one of the parties to the war and that of civilians in an occupied area. It contains specific rules on humanitarian support for those living in occupied territory and outlines the duties of the occupying power toward the civilian population. It also includes a specific regime for the care of interned civilians. It comprises three annexes: model cards, model rules for humanitarian aid, and model agreements on hospitals and safety zones.<sup>10</sup>

### **C. Combatants, Belligerents and terrorists under GC III**

The third Geneva Convention lays down in article 2 that it applies to all cases where war has been declared or in case of any other armed conflict as well which may have arisen due to conflict between two or more of the High Contracting Parties. The convention applies even if one of the parties does not recognize the state of the war. The convention also applies in cases of partial or total occupation, irrespective of whether the occupation doesn't meet with any

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<sup>9</sup> International Committee of the Red Cross, "Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949," IHL Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949> (last visited October 13, 2023).

<sup>10</sup> International Committee of the Red Cross, "Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949," IHL Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949> (last visited October 13, 2023).

armed resistance. The convention continues to apply and bind all the parties in the conflict, even if they are not parties to the convention.<sup>11</sup>

Article 4 is an elaborate provision which gives a conclusive definition of Prisoners of war as regards the convention. According to the definition, Prisoners of War are persons who have fallen into the powers of the enemy and are either members of the armed forces of a party to the conflict or are members of other militias which belong to a party in the conflict and are operating in or outside their own territory. For the latter category, certain conditions must be fulfilled. Such persons shall be commanded by a person responsible for his subordinates; they must have a distinctive sign, carry arms openly, and conduct operations in accordance with the laws and customs of war. The provision also includes the definition of members of armed forces who profess allegiance to an authority, even if the detaining power does not recognise such an authority, persons who accompany such armed forces provided that they have been authorised by the forces, members of crews of such forces, and lastly inhabitants of a non-occupied territory who spontaneously take up arms against the invading forces, called *levee en masse*, given that they openly carry arms and respects laws and customs of war. The article also mentions that persons who are being interned due to them posing a security threat to the detaining power and persons who sought refuge in neutral or non-belligerent countries during the time of conflict and are being interned by that country are also included in the scope of Prisoners of War.<sup>12</sup>

Article 5 of the provisions further lays down that the convention applies to persons defined in Article 4 from the time they fall into the power of enemy hands until their final release and repatriation in accordance with the convention.<sup>13</sup>

In international armed conflicts, combatants are members of the armed forces of a party. The most critical feature their status provides them with is their right to participate directly in

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<sup>11</sup> Fleck, Dietrich (2013). *The Handbook of International Humanitarian Law*. Oxford: Oxford University Press. p. 22 and 322. ISBN 978-0-19-872928-0.

<sup>12</sup> International Committee of the Red Cross, "Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949: Commentary of 2020 - C. Paragraph 1: Scope of application of article 4 - Introduction," IHL Databases, [https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-5?activeTab=undefined](https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commeInternational Committee of the Red Cross, ) (last visited October 13, 2023)  
<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-5?activeTab=undefined> (last visited October 13, 2023).

<sup>13</sup> International Committee of the Red Cross, "Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949: Article 5," IHL Databases, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-5?activeTab=undefined> (last visited October 13, 2023)..



hostilities. If the enemy power captures them, they gain the status of Prisoners of War. Hence, they are protected under the Third Geneva Convention. Civilians are defined as any person who is not a combatant. Since belligerents are people who participate in hostilities, thereby committing a belligerent act, they can fall in either of the two categories depending upon their characteristics.<sup>14</sup>

A fundamental principle of IHL is that every person is distinguished into either one of the two categories: civilians or combatants. IHL prohibits indiscriminate attacks on civilians and civilian structures, deliberate or direct. Such circumstances, when a situation of violence amounts to an armed conflict, are often called “terrorist attacks”, and the perpetrators of the same are called “terrorists.” However, what constitutes a terrorist attack or a terrorist is not defined formally in IHL and is not an official basis for categorising persons. This is because such a classification doesn’t add any extra weight since these acts already constitute war crimes under IHL. Acts of spreading terror among the civilian population and terrorism against civilians in the hands of the adversary are prohibited explicitly by IHL.<sup>15</sup>

#### **D. Implications of being labelled as terrorists and belligerent groups**

In international armed conflicts, combatants have a right to directly participate in hostilities, hence they cannot be tried directly for the acts carried out by them. They have an authorization to use force. In return, they can be held captive until active hostilities cease. However, combatants can be prosecuted under national and international criminal law if they commit acts of genocide, crimes against humanity, and war crimes, even if they have acted under directions from their superiors.<sup>16</sup>

The Additional Protocol I expanded the definitions of "combatants" and "members of armed forces" as outlined in the Third Geneva Convention to account for changes in armed conflicts and the various methods of warfare that have emerged over time. This revised definition aims to establish a consistent framework for protection and assigns equal responsibilities to all individuals who engage in armed conflict. Under the Third Geneva Convention, combatants are granted prisoner-of-war status and are shielded from prosecution for their participation in

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<sup>14</sup> ICRC. "Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929." Retrieved 5 March 2017.

<sup>15</sup> ICRC Casebook, "Combatants," [https://casebook.icrc.org/a\\_to\\_z/glossary/combatants](https://casebook.icrc.org/a_to_z/glossary/combatants) (last visited October 13, 2023).

<sup>16</sup> Jason Callen, "Unlawful Combatants and the Geneva Conventions," *Virginia Journal of International Law* 44 (2004): 1025–1072.

hostilities. However, it's important to note that states typically extend this status to their own national military forces. This status does not apply in non-international armed conflicts, typically involving governmental armed forces battling against non-state armed groups, rebels, or dissidents. In these situations, non-state armed groups are considered parties to the conflict. They are obliged to adhere to the rules of international humanitarian law that apply to non-international armed conflicts. Still, they do not have the privilege of being recognised as combatants.<sup>17</sup>

The major distinction between the legal regime governing terrorism and IHL is that the latter is based on the premise that there aren't any prohibitions against certain acts of violence in war against military objectives and personnel. However, any act of "terrorism" is prohibited and criminal.<sup>18</sup>

Persons who have either lost their combatant status or never had it but have participated in hostilities directly are referred to as "unprivileged combatants" because they do not have the combatant's privilege to commit acts of hostility. They are also called "unlawful combatants" because IHL does not permit their acts. One view opines that IHL does not explicitly prohibit the acts. Instead, it simply allows for their punishment under domestic law. The discussion surrounding this has created much controversy. ICRC has taken the view that such persons must perforce be civilians. This argument is based on the letter of IHL treaties. Article 50(1) of Protocol I define civilians as all those who are not "referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol". For rules regarding the protection of persons in the power of a party, once they are under the enemy's authority, article 4 of Convention IV defines protected civilians as all the people whom Convention III does not protect. This means that anybody not protected by the third convention falls under the gambit of the four conventions.<sup>19</sup>

Another view of those who oppose this classification argues for a third category of "unlawful combatants". The US and Israel have repeatedly endorsed this view in their national courts. It is claimed that "unlawful combatants", like "lawful" combatants, may be attacked until they

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<sup>17</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), especially Chapters 2 and 5..

<sup>18</sup> Knut Dormann, "The Legal Situation of 'Unlawful/Unprivileged Combatants,'" *International Review of the Red Cross* 849 (March 2003): 45–85.

<sup>19</sup> Michael H. Hoffman, "Terrorists Are Unlawful Belligerents, not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law," *Case Western Journal of International Law* 34, no. 2 (2002): 227–230.

surrender or are otherwise hors de combat and may be detained without judicial decision. The rationale underlying this viewpoint is that privilege should not be given to those who don't comply with the requirements set for a status. It can be argued against this perspective since lawful combatants can be easily identified based on the objective criteria laid down in Article 4 of the Third Geneva Convention. In contrast, the membership of unlawful combatants' membership to any armed force or past behaviour and the risk of any future threat they may pose can only be determined individually. As "civilians", unprivileged combatants may be attacked while unlawfully directly participating in hostilities. Convention IV does not bar their punishment for unlawful participation in hostilities if they fall into the enemy's power. In addition, it permits administrative detention for imperative security reasons. From a teleological perspective, it is feared that the concept of "unlawful combatants", denied the protection of Convention IV, could constitute an easy escape category for detaining powers, as the Geneva Conventions contain no rule about the treatment of someone who is neither a combatant nor a civilian.<sup>20</sup>

The term "unprivileged belligerent" is sometimes used interchangeably with "unprivileged combatants" and is used equally to designate fighting members of a non-state armed group in a non-international armed conflict. The specifics of how IHL applies to such persons are unclear and controversial. One view exists which believes that if they fall into enemy hands, they can be legally interned. Still, they are not entitled to the protective regimes designed for prisoners of war or civilian internees. The problem with this reasoning is that it introduces an unacceptable protection gap into the protective framework of international humanitarian law.<sup>21</sup>

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## II. CASE STUDY

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### A. Application of the provisions of GC III pertaining to POV in WWII

After the signing of the first Geneva Convention in 1864, countries agreed that those wounded in war, as well as the people and the facilities catering to the wounded, would merit non-belligerent status. They also reached a consensus on the fact that prisoners should be returned, treated humanely, and should be sent back to their native places after the end of the war. More

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<sup>20</sup> Kurt Ipsen, "Combatants and Non-combatants," in *The Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck (Oxford: Oxford University Press, 1995), 65–80.

<sup>21</sup> Theodor Meron and Allan Rosas, "Current Development: A Declaration of Minimum Humanitarian Standards," *American Journal of International Law* 85 (April 1991): 375–381.

qualifications, clarifications and rules were added to the convention over the next century. In 1929, the Geneva Conventions Relative to the Treatment of Prisoners of War was signed by 47 governments, including Japan. However, Japan violated the conventions. According to Dr. William Skelton III, who authored a document titled "American Ex-Prisoners of War" for the U.S. Department of Veterans Affairs, a higher number of prisoners of war (POWs) lost their lives at the hands of the Japanese during World War II in the Pacific theatre, particularly in the Philippines, than in any other conflict in history. In World War II Germany, the mortality rate among POWs was 1.2%, whereas in the Pacific theatre, it was a staggering 37%. Specifically in the Philippines, the mortality rate among American POWs reached 40%. Among the 11,107 American soldiers captured in the Philippines, many perished within the Philippines. In contrast, others were transported to distant locations such as Korea, Taiwan, Manchuria, or the Japanese home islands, where they met their demise. Tragically, some were also killed while being transported on "Hell Ships," vessels that came under attack from American planes or were torpedoed by American ships, with the crews often unaware that their fellow countrymen were held in the transport holds.<sup>22</sup>

During World War II, the treatment of prisoners of war (POWs) was influenced by a complex interplay of factors. A key determinant was the level of respect and regard for the enemy as fellow human beings. In situations with a sense of shared humanity and benevolence, such as in the Western theatres and among the Allies in the Far East, the 1929 Geneva Convention served as a practical standard for measuring treatment. However, the primary driving force behind humane treatment often revolved around the desire to ensure the well-being of one's own prisoners held by the enemy. When this concern for reciprocity was absent, even the most conscientious detaining powers found ways to circumvent the spirit of the convention. This was especially evident in the Pacific War, where Japanese prisoners received significantly different treatment at the front lines, where no neutral observers were present, compared to camps accessible to the International Committee of the Red Cross (ICRC) and protecting powers. In cases where ideological animosity was intense, empathy for enemy prisoners diminished significantly. In the Russo-German War and primarily on the part of the Japanese in the Far East and the Pacific, the enemy was often seen as an embodiment of evil that could not be tolerated. In such situations, the survival of POWs depended on their perceived

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<sup>22</sup> PBS, "Bataan, Japan, POWs, and the Geneva Conventions," <https://www.pbs.org/wgbh/americanexperience/features/bataan-japan-pows-and-geneva-conventions/> (last visited October 13, 2023).

usefulness to their captors in contributing to the war effort. Even when utilitarian considerations outweighed malevolent ideologies, prisoners received only the minimum essentials for survival, and humanitarian concerns were primarily disregarded. The ideological context of war played a crucial role in shaping the treatment of POWs. When the enemy was viewed as fundamentally different and hostile, considerations for their welfare were often discarded. Those who fell into enemy hands were seen as traitors to their own country, and their mistreatment was considered justified. The 1929 Geneva Convention aimed to impose a framework of limitation and regulation in conflicts, but it struggled to do so effectively in wars that knew no limits. Under such circumstances, POWs were often treated as expendable resources or, in the worst cases, as part of the unresolved issues of the battlefield. World War II marked a transitional phase in treating POWs, witnessing a shift away from the dominance of a humanitarian perspective. Malevolent ideological and utilitarian considerations gained prominence, and this trend continued in subsequent conflicts, including the Korean and Vietnam Wars. Paradoxically, during this period of increasing scientific and technological advancements that extended human life, the humane standards codified in the Geneva Conventions seemed impractical or irrelevant in the face of evolving warfare.<sup>23</sup>

## B. Application during war on terror

Regarding the "global war on terror," most measures taken by states and others to prevent or combat acts of terrorism don't typically constitute armed conflicts, whether in practice or under legal definitions. It's more appropriate to characterize these efforts as a broader struggle against terrorism, which is a complex and multifaceted undertaking that occasionally escalates into armed conflicts. When armed conflicts arise in such situations, they trigger the application of International Humanitarian Law (IHL) rules for international or non-international armed conflicts, depending on the circumstances. In both cases, all parties involved must adhere to IHL rules, including those governing the conduct of hostilities and the treatment of the wounded, prisoners, and civilians.<sup>24</sup>

It's important to note that IHL does not apply when terrorist acts occur or when individuals suspected of terrorism are detained outside the context of an armed conflict. The International

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<sup>23</sup> Colombo & Hurd, "Geneva Conventions of 1949 & Additional Protocols," <https://www.colombohurdlaw.com/geneva-conventions-of-1949-additional-protocols/> (last visited October 13, 2023).

<sup>24</sup> Adam Roberts, "The Laws of War in the War on Terror," in *International Law and War on Terror*, in *International Law Studies*, Volume 79, eds. Fred L. Borch and Paul S. Wilson..

Committee of the Red Cross (ICRC) employs a case-specific approach to categorise situations of violence legally, and this approach extends to determining the status and rights of individuals detained in the fight against terrorism. If they are detained during an international armed conflict, the ICRC is entitled to access them according to relevant IHL regulations. In cases where the fight against terrorism is a non-international armed conflict, the ICRC offers its humanitarian services to the involved parties. In situations outside of armed conflicts, the ICRC exercises its right of humanitarian initiative to request access to detained individuals.<sup>25</sup>

The U.S. administration held the position during the conflict in Afghanistan that the Geneva Convention did not apply to their conflict with al Qaeda, as al Qaeda was not a party to the Convention. Consequently, according to the U.S. administration, individuals captured during this conflict, including members of al Qaeda, were not considered prisoners of war but rather "unlawful combatants" with no rights under the Geneva Convention. This stance conflicted with generally accepted principles regarding applying International Humanitarian Law (IHL). The official commentary on the Geneva Conventions emphasises a fundamental principle that every person in enemy custody must have some status under international law. They are either prisoners of war, protected by the Third Convention, civilians protected by the Fourth Convention, or medical personnel protected by the First Convention. No "intermediate status" means no one in enemy custody can be outside the law. Under this interpretation, individuals captured during the wars in Iraq and Afghanistan were entitled to some level of protection under the Geneva system. The extent of protection varied depending on whether they were considered prisoners of war or civilians. For members of the regular armed forces of the opposing party, the general principle was that any captured combatant was a prisoner of war. The Third Geneva Convention outlined the criteria for this status, including members of militias or volunteer corps associated with the armed forces. Importantly, this applied even if the detaining power did not recognise the party to which the captured combatant belonged. It's worth noting that the conditions specified in Article 4A(2) of the Third Geneva Convention, which relate to "other militias" and "voluntary groups," applied only to those specific categories of combatants. Therefore, members of the Taliban army captured during the Afghanistan war clearly fell into the category defined in Article 4A(3) as "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power." On the other hand, the U.S. position seemed to incorrectly assume that combatants

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<sup>25</sup> ICRC Casebook, "War on Terror," [https://casebook.icrc.org/a\\_to\\_z/glossary/war-terror](https://casebook.icrc.org/a_to_z/glossary/war-terror) (last visited October 13, 2023).

under Article 4A (3) must fulfil the conditions of Article 4A(2) to be considered prisoners of war. As for members of al Qaeda captured in Afghanistan, they did not fit the definition of "members of the armed forces" of a belligerent. They could potentially be categorised as a "voluntary militia" under Article 4A but must meet the conditions specified in Article 4A (2) to be recognised as prisoners of war. Crucially, no individual determinations of status were made by any competent tribunal, as required by Article 5 of the Third Geneva Convention. This article mandates that if there is any doubt regarding the status of enemy combatants, they must be granted protection under the Convention until their status is determined by a competent tribunal on a case-by-case basis. Generalized determinations about the status of groups of detainees or entire categories of combatants, particularly when made by the executive, do not align with the requirements of Article 5.<sup>26</sup>

Hence, individuals who were members of al Qaeda and were captured while participating in the theatre of military operations alongside a belligerent's armed forces should have been considered prisoners of war (POWs) until a competent tribunal determined their status. However, even if a determination were made that a specific individual did not qualify for POW status, they would still be entitled to some level of protection under the Geneva system. Specifically, captured enemy combatants who did not meet the criteria for POW status would generally fall under the category of "protected persons" as outlined in the Fourth Geneva Convention. This category includes individuals who were not actively engaged in hostilities and those referred to as "unprivileged belligerents." These individuals engaged in belligerent acts but were determined by a competent tribunal not to be eligible for POW status as defined in Article 4 of the Third Geneva Convention. The critical distinction in the denial of POW status is that these individuals do not have the "combatant privilege," which means they may potentially face prosecution solely for their participation in combat. However, individuals who are nationals of the opposing party and do not qualify for POW status, falling instead under the category of "protected persons" as per the Fourth Geneva Convention, enjoy certain protections that are not extended to POWs. One notable protection is the absolute prohibition of their deportation from occupied territory.<sup>27</sup>

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<sup>26</sup> Shlomy Zachary, "Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?," *Israel Law Review* 38, no. 1-2 (2014): 378-417. doi:10.1017/S0021223700012772.

<sup>27</sup> Supreme Court of the United States, "Opinion of the Court in Hamdan v. Rumsfeld," [https://www.supremecourt.gov/opinions/URLs\\_Cited/OT2005/05-184/05-184\\_2.pdf](https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184_2.pdf) (last visited October 13, 2023).

### C. Application of the same in the recent Ukraine-Russia War and implications

On February 24, 2022, there was a significant escalation in the conflict between Russia and Ukraine, marking the largest attack on a European nation since World War II. This invasion resulted in a substantial number of Ukrainian civilian and military casualties, with tens of thousands affected. By April 2023, approximately 8 million Ukrainians had been displaced within their own country, and more than 8.2 million had fled Ukraine, leading to the largest refugee crisis in Europe since World War II. Additionally, the extensive environmental damage caused by the war had far-reaching consequences, contributing to global food shortages. Before this invasion, there were reports of Russian military buildup near Ukraine's borders, although Russian officials repeatedly denied any intention to launch an attack. Russian President Vladimir Putin eventually announced a "special military operation" to support the separatist regions of Donetsk and Luhansk, which had conflicted with Ukraine since 2014. Putin questioned Ukraine's legitimacy and falsely accused its government of being controlled by neo-Nazis who persecuted the Russian minority. He stated his objective was to "demilitarise" and "denazify" Ukraine. The Russian military initiated air strikes and ground offensives from various fronts, including the north from Belarus towards Kyiv, northeast towards Kharkiv, south from Crimea, and southeast from the Donbas. In response, Ukraine declared martial law and a general mobilisation. By April 2022, Russian forces had encountered logistical difficulties and strong Ukrainian resistance, leading to their withdrawal from the northern front. Russia captured Kherson in March and Mariupol in May after a destructive siege in the south and southeast. The conflict continued in the Donbas region, with Russia conducting bombings that extended far beyond the front lines, including attacks on the energy infrastructure during the winter. Towards the end of 2022, Ukraine launched counteroffensives in the south and east. Russia subsequently announced the illegal annexation of four partially occupied areas. In November, Ukraine regained control of parts of Kherson Oblast, including the city of Kherson itself. In June 2023, Ukraine initiated another counteroffensive in the southeast.<sup>28</sup>

The international community strongly condemned the invasion. The United Nations General Assembly passed a resolution in March 2022, denouncing the invasion and demanding a complete Russian withdrawal. The International Court of Justice ordered Russia to halt military

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<sup>28</sup> James FitzGerald, "Ukraine War: Anti-Kremlin Fighters Say Russian Soldiers 'Captured,'" BBC News, February 4, 2023, <https://www.bbc.com/news/world-europe-65804249> (last visited October 13, 2023).



operations, and the Council of Europe expelled Russia from its membership. Numerous countries-imposed sanctions on Russia and Belarus and provided humanitarian and military assistance to Ukraine. Protests against the war erupted worldwide, with anti-war demonstrators facing mass arrests and increased media censorship in Russia. Over 1,000 companies left Russia and Belarus in response to the invasion. In March 2023, the International Criminal Court (ICC) initiated an investigation into potential crimes against humanity, war crimes, child abductions, and genocide, ultimately issuing an arrest warrant for President Putin.

During a Security Council meeting, tensions and conflicting narratives regarding the situation in Ukraine came to the forefront, with the representative of the Russian Federation branding Ukrainian forces as terrorists and making serious allegations against Ukraine's actions. The Russian delegate accused Ukraine of employing terrorist tactics to achieve its political objectives, while Ukraine vehemently defended its actions as self-defence against Russian aggression. This exchange shed light on the complexities and contentious nature of the ongoing conflict. The Russian representative asserted that Ukraine's alleged "terrorist essence" became apparent in 2014. This assertion was tied to what the Russian Federation called the "Maidan coup," suggesting that organised groups of armed nationalists in Ukraine began to carry out violent acts, including disturbing incidents where individuals were reportedly driven into buildings and those structures were subsequently set on fire. These allegations aimed to paint a picture of Ukraine as a nation employing extreme and violent methods for political gain. Moreover, the Russian delegate implied that Western powers had a history of supporting terrorist organisations for geopolitical interests. They suggested that Western support played a role in enabling the rise of radical "neo-Nazi" and white nationalist groups in Ukraine, which, from the Russian perspective, were initially used to overthrow the government. This narrative sought to highlight the role of external actors in shaping the conflict. Additionally, the Russian delegate raised concerns about the objectivity of the United Nations, suggesting that the organisation had granted Ukraine a "carte blanche" for its actions, regardless of the alleged use of terrorist tactics. This criticism underscored a perceived bias within international institutions and called for a more critical evaluation of Ukraine's actions by the international community. In response to these accusations, the representative of Ukraine vigorously defended their actions, emphasising that they were compelled to choose between exercising their legitimate right to self-defence and facing annihilation. Ukraine strongly rejected the allegations of terrorism and maintained that the Russian Federation's aggression and purported terrorism

against peaceful cities and civilians posed the gravest threat to international peace and security.<sup>29</sup>

The exchange in the Security Council meeting highlighted the deep divide in narratives surrounding the ongoing conflict in Ukraine. While the Russian Federation accused Ukraine of using terrorism and sought to cast doubt on the objectivity of international institutions, Ukraine defended its actions as self-defence in the face of Russian aggression. It emphasised the need for international accountability mechanisms to address the situation effectively.<sup>30</sup>

In multiple statements, Volodymyr Zelensky, President of Ukraine, was also heard saying calling the Russian troops “terrorists” and even saying, “No other terrorist in the world, apart from Russia, has ever so openly and intentionally targeted the security of so many nations at once.”<sup>31</sup>

The example of the Russia-Ukraine war is a good example of the consequences of the lack of availability of proper classifying criteria. As has been discussed above as well, there is no term called “terrorists” in IHL during war times. By applying this criterion whenever convenient, the parties give themselves a leeway to commit war crimes, which are difficult to punish since the people who were committed didn’t fit any category of protected individuals.<sup>32</sup>

On 29 July 2022, a Russian-operated prison in Molodizhne near Olenivka, Donetsk Oblast, was destroyed, killing 53 Ukrainian prisoners of war and leaving 75 wounded. The prisoners were mainly soldiers from the Azovstal complex, the last Ukrainian stronghold in the siege of Mariupol.<sup>33</sup>

Both Ukrainian and Russian authorities accused each other of the attack on the prison. The General Staff of the Ukrainian Armed Forces said that the Russians blew up the barrack in

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<sup>29</sup> Jemma Arman, "GCIII Commentary: Protecting the Honour of Prisoners of War," ICRC Law and Policy Blog, September 3, 2020, [URL] (last visited October 13, 2023).

<sup>30</sup> United Nations, "Delegates Criticize Russian Federation for Consuming Resources of Security Council: Ukraine Did Nothing to Provoke War, Many Speakers Underscore, Condemning Atrocities Perpetrated by Moscow," United Nations Press Release, [Publication Date], [URL] (last visited October 13, 2023).

<sup>31</sup> "Volodymyr Zelensky Says Russian 'Terrorist' Attacks on Ukraine a Threat to 'Global Food Security'," WION News, August 17, 2023, [URL] (last visited October 13, 2023).

<sup>32</sup> "Russia Vows Retaliation for Ukraine's 'Terrorist Attack' on Crimean Bridge," Reuters, August 12, 2023, [URL] (last visited October 13, 2023). "Russia Vows Retaliation for Ukraine's 'Terrorist Attack' on Crimean Bridge," Reuters, August 12, 2023, [URL] (last visited October 13, 2023). "Russia Vows Retaliation for Ukraine's 'Terrorist Attack' on Crimean Bridge," Reuters, August 12, 2023, [URL] (last visited October 13, 2023). "Russia Vows Retaliation for Ukraine's 'Terrorist Attack' on Crimean Bridge," Reuters, August 12, 2023, [URL] (last visited October 13, 2023).

<sup>33</sup> Kimberley N. Trapp, "The Use of Force against Terrorists: A Reply to Christian J. Tams," *European Journal of International Law* 20, no. 4 (November 2009): 1049-1055, <https://doi.org/10.1093/ejil/chp101>.

order to cover up the torture and murder of Ukrainian POWs that had been taking place there. Ukrainian authorities provided what they said were satellite images of pre-dug graves and intercepted communications indicating Russian culpability. At the same time, Russians suggest that a HIMARS rocket was shot from Ukrainian territory. On 3 August, the UN secretary-general Antonio Guterres announced his decision to establish a fact-finding mission, as requested both by Russia and Ukraine.<sup>34</sup>

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### III. PROPOSED SOLUTION: CREATION OF DISTINCT LAW FOR DEFINING, CLASSIFYING AND PROTECTING “TERRORISTS”

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As has been demonstrated in the last section, the term “terrorist” has been applied and misapplied several times during war times. In World War II, the provisions of the Third Geneva Convention were disregarded gravely by Japan and other powers, but no legal action was taken. The detainees were not provided any security or protections that prisoners of war are entitled to.<sup>35</sup> The horrors of war which had a deep and far-reaching impact proved to be a catalyst for the development numerous things around the world, one of them being the Geneva Conventions. In the context of the third Geneva Convention, only a few new amendments were added and a few changes made. Certain explanations and clarifications were added as well. However, this is not where the most drastic change came. Massive shifts were seen in the implementation and execution of by the governments of various states. After the war, when soldiers came back home, more often than not those captured and detained during the war did come back. Among those who did, many of them had been subjected to torture and had been physically and mentally maimed for life. It was then that the popularity of the Convention grew and it became universally recognized and ratified by almost all of the existing countries. Shortly thereafter, a lot of their provisions started to be considered customary international law. With the popularity came the awareness of these conventions, Governments could no longer shirk from the responsibilities they owed to the prisoners of war. ICJ was also constituted and claims started to be brought in front of the court for violation of the conventions. To escape liability, the governments started to deny the POW status, even to persons who fulfilled the criteria. This

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<sup>34</sup> C. Tams & J. Devaney, "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence," *Israel Law Review* 45, no. 1 (2012): 91-106. doi:10.1017/S0021223711000033.

<sup>35</sup> Patricia Hului, "Escaping POW Camps during WWII Japanese Occupation," *KajoMag*, August 19, 2021, [URL] (last visited October 13, 2023).

was seen in the War on Terror, where the US government under Bush detained multiple people in the Guantanamo Bay prisons. Under IHL, those prisoners should have had protections either under the Third Geneva convention as prisoners of war or under the Fourth Geneva convention as civilians. The US, however, took a completely different stance. It came up with a third, new category of detainees, and called them “unprivileged combatants” or “unprivileged belligerents.” Since this category does not find place anywhere in IHL, the US defined and explained it unilaterally. As explained by Bush, the people falling under this category did not have any protections under the Third or Fourth Conventions. They were protected only under Additional Protocol I, which lays down bare minimum protections and only prescribes a mere “humane treatment standard”. Bush also clarified that they could be held directly liable for their crimes, they could be detained perpetually without a trial, they were not entitled to any aid from any outside organisation, and they did not have any rights either to meet their family or to be granted parole, or to be repatriated after the end of hostilities. This essentially meant that once detained, the people were at the complete mercy of the detaining power. This is problematic in many respects. Firstly, it violates one of the most basic principles of IHL: that no man is unprotected in war. Secondly, the people, if they were a part of Al-Qaeda, did fulfil the requirements of being POWs. If they weren’t a part, they could be classified as civilians. Thirdly, if their status was under dispute, then as prescribed in the conventions, they should have been treated as POWs until a competent tribunal decided or affirmed their status. The US created this third category out of thin air, with no jurisprudence or law backing it. This can arguably be called the beginning of the popularity of the use of the term terrorist, as opposed to any of the recognised categories of people. A similar trend was reflected in the more recent war between Russia and Ukraine. The conflict started when Russia illegally invaded Ukrainian territory and used force to do so. Military forces of both countries were engaged in the warfare, and heavy bombing took place along with other artillery. Here, once again, both countries quickly labelled the other as a “terrorist.” Another pattern of grave misuse was observed wherein instead of taking Ukrainian soldiers as POWs, the Russian military killed them on the spot after capture. Russia justified its actions by stating that terrorists had ambushed the Russians and were initially overpowered, following which they were able to take over the terrorists and hence they were shot. Using this classification, Russia could shirk its responsibility for the war casualties it was causing to civilians and civilian infrastructure. Multiple bombings at civilian settlements were justified because the people attacked were terrorists. Another term that was often used was “terrorist state”. It is another vague term with

no official or universally agreed definition. This means no standard needs to be met and no clarity on the implications or consequences for the detaining power.

This highlights the need for a specific criterion for “terrorists” during wartime. Firstly, special legislation shouldn’t be drafted focusing solely on international terrorism during war. This is because new legislation takes a long time to form in substance. Consensus can take extremely long to form during this scenario due to the conflicting interests of the state parties, and more importantly due to the parties' common interest to detain persons in the name of “terrorists” and get away with it. Further, due to the nature of the subject matter, the legislation will not have any affect till it is ratified by close to all the nations, and more importantly countries which often engage in war. This is another process that can be very time consuming. Secondly, the criteria must fall fully within the ambit of IHL. This is because IHL largely lays down the rules for the protection of people during war. If the category is not included in IHL, then obligations of the protected people might not be respected and it might lead to a misuse of the legislation in the hands of those taking protection. Thirdly, clear penalties and implications must be chalked out to ensure that violating parties do not get away Scott free.

To ensure all of these above considerations, the most suitable way to move forward would be to amend the Third Geneva Convention to include “terrorists”. This way, the so-called terrorists are treated like others who have engaged in violence against the detaining power. This would also be a faster process since it is an amendment in the already universally accepted convention. Due to this, it is also more likely that the provision will become a part of the customary international law. Further, the “terrorists” can be detained in humane conditions till they are repatriated and then can be dealt with by domestic or national legal systems under their terrorist provisions.

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#### IV. CONCLUSION

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The examination of the Geneva Conventions, their historical context, and their application in various conflicts, including World War II, the War on Terror, and the recent Ukraine-Russia War, highlights the complexities and challenges associated with classifying and protecting individuals during armed conflicts. These challenges have become particularly evident when parties to conflicts label their adversaries as "terrorists," a term not explicitly defined or addressed by the Conventions. The Geneva Conventions, born out of the horrors of World War II, established a framework for the protection of individuals during armed conflicts. They provide clear classifications for individuals, such as prisoners of war (POWs) and civilians,

and outline their respective rights and protections. However, the Conventions do not include a specific category for "terrorists," leading to potential misuse of the term and the denial of established protections. In the War on Terror, the United States controversially created a new category of "unprivileged combatants" or "unprivileged belligerents" to classify detainees, which raised concerns about the adherence to international humanitarian law. This move underscored the need for a more precise and universally accepted classification for individuals involved in acts of terrorism during armed conflicts. The Ukraine-Russia War further demonstrated the misuse of the term "terrorist" by conflicting parties to justify their actions and avoid accountability for violations of international humanitarian law. Both sides labelled each other as terrorists, leading to grave consequences for civilians and combatants. The lack of a clear legal framework for dealing with individuals engaged in acts of terrorism in armed conflicts exacerbated the situation.

To address these challenges and promote the protection of all individuals during armed conflicts, there is a compelling need for the international community to consider creating a distinct legal framework for defining, classifying, and protecting individuals involved in acts of terrorism during wartime. This framework should be developed within the context of the Geneva Conventions, ensuring that it aligns with established principles of international humanitarian law. Such a framework would provide clear criteria for the classification of individuals engaged in acts of terrorism, ensuring that they are afforded appropriate protections while also being held accountable for their actions. By integrating this framework into the existing Geneva Conventions, the international community can establish a comprehensive and universally accepted approach to addressing the challenges posed by terrorism in armed conflicts.

In conclusion, the complexities surrounding the classification and protection of individuals involved in acts of terrorism during armed conflicts underscore the need for a dedicated legal framework. By developing and integrating such a framework within the Geneva Conventions, we can strengthen the protections afforded to all individuals during times of war, promote accountability, and work towards a more just and secure world. As we move forward, it is essential to prioritise the development of this framework to address the evolving nature of conflicts and ensure the rights and safety of all individuals are upheld.